

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GREGORY FRANKLIN,

Plaintiff,

vs.

L.E. SCRIBNER, et al.,

Defendants.

CASE NO. 07cv438 BTM (LSP)

**ORDER RE:**

**(1) PLAINTIFF'S MOTION FOR  
LEAVE TO FILE AN AMENDED  
COMPLAINT [Doc. #41]**

**and**

**(2) DEFENDANT'S PENDING  
MOTION TO DISMISS [Doc. #37]**

On March 8, 2007, Plaintiff, a California state prisoner proceeding pro se, filed a complaint under 42 U.S.C. § 1983. On August 14, 2007, Defendants filed a motion to dismiss the complaint on a number of grounds. The motion was calendared for hearing on October 12, 2007. On August 29, 2007, Plaintiff filed an ex parte "Request to Amend Petition to Correct Deficiencies." In his filing, Plaintiff indicates that Defendant's motion to dismiss identified a number of deficiencies in his original complaint that were unintentional and he requests leave to file an amended complaint. Plaintiff's proposed amended complaint is attached as Exhibit B to his "request." The Court deems Plaintiff's filing a motion for leave to file an amended complaint.

Federal Rule of Civil Procedure 15(a) requires that leave to amend a complaint be "freely given when justice so requires." See Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9<sup>th</sup> Cir. 1990) (Rule 15(a) amendment policy "is to be applied with extreme liberality"). However, the Court notes that, beyond amendment by leave of the court, Rule

1 15(a) allows a party to amend its pleading "once as a matter of course at any time before a  
2 responsive pleading is served." In this case, Defendants have not yet filed an answer to  
3 Plaintiff's original complaint. Rather, they filed a motion to dismiss under Federal Rule of  
4 Civil Procedure 12(b). A motion to dismiss, however, is not a "responsive pleading" within  
5 the meaning of Rule 15(a). See Breier v. Northern Cal. Bowling Proprietors' Ass'n, 316 F.2d  
6 787, 789 (9th Cir. 1963). Therefore, Plaintiff is permitted to amend his complaint as a matter  
7 of course at this juncture. Accordingly, Plaintiff's amended complaint, which is attached as  
8 Exhibit B to Plaintiff's present motion, shall be re-filed by the Clerk as a "First Amended  
9 Complaint."

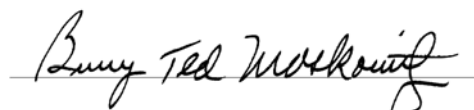
10 In addition, in light of the fact that Plaintiff's operative pleading has now been  
11 replaced, the Court hereby requests that Defendants file a notice, within 15 days of entry of  
12 this order, indicating whether they wish to proceed with their previously filed motion to  
13 dismiss, or whether they wish to withdraw it and file a new response to Plaintiff's amended  
14 complaint.

15 If Defendants indicate that they intend to proceed with their previously filed motion,  
16 the hearing on Defendants' motion will remain calendared for October 12, 2007. Plaintiff  
17 must be prepared to file any opposition to the motion by September 28, 2007, in accordance  
18 with CivLR 7.1(e)(2).

19 If, however, Defendants withdraw their pending motion to dismiss, they will be  
20 required to file a response to Plaintiff's amended complaint within 30 days of entry of this  
21 order. Any withdrawal by Defendants of their pending motion will be without prejudice to their  
22 ability to file a renewed motion to dismiss.

23  
24 **IT IS SO ORDERED.**

25 DATED: September 4, 2007

26 

27 Honorable Barry Ted Moskowitz  
28 United States District Judge